STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of DESTINEE ROSE DENTLER and MACKENZIE BROOKE DENTLER, Minors.

FAMILY INDEPENDENCE AGENCY,

Petitioner-Appellee,

v

GARY DUANE DENTLER,

Respondent-Appellant.

UNPUBLISHED
March 30, 2004

No. 251198
St. Joseph Circuit Court
Family Division
LC No. 02-000495-NA

Before: Zahra, P.J., and Saad and Schuette, JJ.

MEMORANDUM.

Respondent appeals as of right from the trial court's order terminating his parental rights to the minor children pursuant to MCL 712A.19(3)(g) and (j). We affirm.

I. FACTS

At the time of the hearing on the petition to terminate respondent's rights, he had been convicted of second-degree home invasion and had less than two years to serve on a sentence of three to fifteen years in prison. However, before going to prison, the children were removed from his care because of the domestic abuse of his wife in front of the children, his history of criminal behavior and substance abuse, his refusal of rehabilitative services, and his failure to provide financial support. The evidence indicated that when the children were taken from his care, they had emotional and behavioral problems, as well as developmental delays.

While in prison, respondent took a class on job seeking skills, earned his GED, and became actively involved in substance abuse programs. He stated that he hoped these achievements would enable him to take back custody of his children someday, but acknowledged that he would not be ready immediately upon his release. Upon subsequent questioning, he indicated that he did not object to his half-sister and her husband raising the children, but did not want them to lose his name or call someone else "Dad." His half-sister's intention was to adopt the girls.

II. ANALYSIS

The trial court terminated respondent's parental rights pursuant to MCL 712A.19b(3)(g) (no reasonable expectation that the parent will be able to provide proper care and custody within a reasonable time considering the child's age) and (j) (reasonable likelihood, based on the conduct or capacity of the child's parent, that the child will be harmed if he or she is returned to the home of the parent). Respondent asserts that his voluntary participation in and commitment to educational programs and drug treatment while in prison support the expectation that he will become a productive citizen less likely to engage in criminal activity. Thus, he claims that there was no reasonable likelihood that the children would be harmed if returned to his care, and that there was a reasonable expectation that he would be able to assume proper care and custody. However, since respondent acknowledged that he would not be able to provide proper care and custody upon his release, and that he had no strong conviction about ever assuming care and custody of the children, but simply wanted them to retain his name, it cannot be said that there was clear error in the trial court's determination that respondent would not be able to provide proper care and custody within a reasonable time. See MCR 3.977(J); *In re Sours*, 459 Mich 624, 633; 593 NW2d 520 (1999). Given that this was a valid basis for termination, we need not address the propriety of the ruling as to likelihood of harm if returned to respondent's care. See *In re Powers*, 244 Mich App 111, 118; 624 NW2d 472 (2000).

Respondent also asserts that MCL 712A.19b(3)(h) (providing for termination when the parent will be incarcerated for more than two years after filing the petition) indicates how incarceration should influence the decision to terminate rights. He asserts that his performance in prison indicates that he would be able to assume care and custody within two years and that it would undermine *In re Perry*, 193 Mich App 648; 484 NW2d 768 (1992), to hold that termination could properly be based on other statutory grounds when the only remaining substantial factor supporting termination is respondent's incarceration. This reasoning is flawed. *Perry* does indicate, as respondent represents, that the period of incarceration at issue is the prospective period and not time already served. However, the *Perry* Court held that even though it would be less than two years before the respondent would be released, the court properly relied on the finding that the respondent would not be able to provide proper care and custody within a reasonable time. Thus, contrary to defendant's assertion, subsection 19b(3)(h) is merely an alternative ground for terminating rights, not the only ground that can be relied upon when a parent is incarcerated.

Affirmed.

/s/ Brian K. Zahra
/s/ Henry William Saad
/s/ Bill Schuette